licensees may not add additional links and are limited to whatever frequency pairs are authorized. [283]

171. Moreover, Nevada DOT refutes the benefits that the Commission found in favor of dismissing the traffic system applications filed by Nevada DOT and the Cities. The Commission recognized that the system had been underway for several months and that Nevada DOT, Sierra, and other commenters requested implementation because of the special circumstances. Based on the record at that time, however, the Commission concluded that dismissal of the applications would spare the unnecessary expenses of implementing a system for which the future is at best uncertain under the impact of expanding LMDS operations.[284] Sierra, however, contends that the costs to Nevada DOT of doing without the traffic system are greater than the Commission believed and require a second look.[285] Nevada DOT asserts that, rather than be spared any expenses, the failure to authorize the applications for the traffic system will result in considerable stranded public investment in 31 GHz equipment that is already installed and operationally tested.[286] In these circumstances, we cannot conclude that dismissal of these applications serves the public interest in the manner the Commission anticipated, but rather that permitting the operations on a secondary basis to LMDS under the limitations requested by Nevada DOT will enable implementation of traffic control systems, will provide time to obtain replacement technology, and will not adversely impact the implementation of LMDS.

172. We find on reconsideration that the circumstances of the 31 GHz pending applications are distinguishable from those in the *220 MHz Third Report and Order*[287] and the

[283] LTTS licenses are authorized nationwide without designation of points to serve short-term immediate point-to-point needs for radio links. If any of the dismissed applicants seeks LTTS licenses, the operations they initiate could be anywhere nationwide and cannot be limited. This is different from the Commission's treatment in the *Second Report and Order* of incumbent LTTS licenses, which were limited to operations already in existence. *Id.* Nonetheless, we find that the limited nature of LTTS and the limitations placed on the growth of other 31 GHz services, in conjunction with their secondary status to LMDS, precludes any delays in implementation or expansion of LMDS.

[284] *Id.* at 12589-90 (para. 101).

[285] Sierra Petition at 17.

[286] Nevada DOT *ex parte* Letter of May 29, 1997.

[287] *220 MHz Third Report and Order*, 12 FCC Rcd at 11038-41 (paras. 197-206).

39 GHz Report and Order[288] in
which the Commission dismissed pending applications. As here, those proceedings adopted new rules for wireless services that significantly altered the existing service rules to establish a new service and had pending applications filed under the existing rules that had been held in abeyance.[289] The Commission found that dismissal was in the public interest, noting in the *39 GHz Report and Order* that a grant under the previously existing rules would frustrate the Commission's goals by continuing the licensing scheme that was being replaced, and by affecting the initiation of desirable new services under the new rules in those bands.[290] In addition, the Commission noted in the *220 MHz Third Report and Order* that authorizing the pending applications would restrict the pool of new applicants, who would be prevented from seeking the new licenses that encompassed the areas encumbered by licensees operating under the previous service rules that were no longer in the public interest.[291]

173. As we discuss in this section, we find that none of these factors is present in weighing the impact of permitting, on a *secondary basis* to LMDS, the operations in the dismissed 31 GHz applications on our goal to implement LMDS on the 31 GHz band. Although it is well established that the Commission may dismiss pending applications that do not comply with new rules,[292] there is no requirement that we do so in a case where, as here, the public interest would benefit and no harm would ensue from permitting the requested operations.

ii. Procedure and Rule Changes

174. In order to implement our decision to permit 31 GHz operations secondary to LMDS, we affirm the dismissal of the pending applications, but without prejudice to their being refiled under the application procedures for authorization of the same 31 GHz services

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[288] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, RM 8553, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37-0-38.6 GHz and 38.6-40.0 GHz, PP Docket No. 93-253, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997) (*39 GHz Report and Order*).

[289] *220 MHz Third Report and Order,* 12 FCC Rcd at 11038 (paras. 197-198); *39 GHz Report and Order*, 12 FCC Rcd at 18639-45 (paras. 83-97).

[290] *220 MHz Third Report and Order,* 12 FCC Rcd at 11038 (para. 198); *39 GHz Report and Order*, 12 FCC Rcd at 18644 (para. 96).

[291] *220 MHz Third Report and Order*, 12 FCC Rcd at 11038-39 (para. 200).

[292] *Id.* at 11040-41 (para. 206).

previously requested as modified in this Order.[293] The *Second Report and Order* directed that the filing fees be refunded to the extent fees were paid when the dismissed applications were filed, noting that governmental entities are exempt from the fee requirement.[294] Any refiling of a dismissed 31 GHz application must be for authorization of the same stations and services requested in that dismissed application. Such authorized operations are afforded the same status, as previously afforded under the 31 GHz licensing rules, to share the frequency with other 31 GHz operations without protection from harmful interference with each other.[295] However, such operations are limited to secondary status to LMDS operations, *and* cannot interfere with LMDS, *and* must accept interference from LMDS. The refiling option is available for a 60-day period following the effective date of the rules adopted in this Order. Only entities that had applications pending as of the adoption date of the *Second Report and Order* on March 11, 1997, and dismissed at that time will be eligible to submit applications, and we will not accept any new applications for such operations.

175. All of the dismissed 31 GHz applications requested authorization for fixed microwave services and, therefore, any applications to be refiled would be governed by the service rules in Part 101of the Commission's Rules.[296] Thus, applications shall be resubmitted under the requirements in Section 101.13, Section 101.15, or the LTTS procedures in Section 101.801, as appropriate to the service requested.[297] The *Second Report and Order* modified certain operating rules to limit assignment in the 31 GHz band to LMDS after March 11,

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[293] We have decided that affirming the dismissal of applications without prejudice is a more reasonable approach than reinstating the applications. Circumstances have changed since the dismissed applications were filed and, as we have discussed, any authorization of 31 GHz services in such new licenses will be secondary to LMDS and limited to the scope of the services authorized, without modification or expansion. While the applicants may still expect to obtain 31 GHz authorization to provide the 31 GHz services they intended, they may not wish to operate subject to the new limitations on expansion and subject to secondary status to LMDS. Thus, we provide the dismissed applicants the option to refile the dismissed applications if they decide to seek authorization to operate at 31 GHz under these terms.

[294] *Second Report and Order*, 12 FCC Rcd at 12589 (para. 100 n.141), 47 C.F.R. §§ 1.1113, 1.1114(f).

[295] *Id.* at 12571-72 (para. 54), citing former Section 101.147(t) of the Commission's Rules, 47 C.F.R. § 101.147(t).

[296] Although some of the applications may have been filed under previous service rules before they were consolidated in Part 101, all applicants will refile their authorization requests in the dismissed applications under the rules and procedures in Part 101, which streamlined and simplified the previous rules. Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules To Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, CC Docket No. 93-2, McCaw Cellular Communications, Inc., Petition for Rulemaking, RM-7861, Report and Order, 11 FCC Rcd 13449 (1996) (*Part 101 Report and Order*).

[297] 47 C.F.R. §§ 101.13, 101.15, 101.801.

1997, and to accommodate the continued operations of incumbent 31 GHz licensees by preserving their technical requirements to the extent they were authorized before March 11, 1997.[298] We will amend those rule modifications to permit the assignment of the 31 GHz band to those 31 GHz licenses based on the dismissed 31 GHz applications filed before March 11, 1997, but authorized after such date, and to permit their operations. We include the clarification that new licensees must operate on a secondary basis to LMDS.

176. Under Part 101, any licenses, which are secondary to LMDS, to be issued based on the refiled applications would be for a 10-year period and may be renewed.[299] We do not adopt the proposal of Nevada DOT that any grant be temporary. This will permit use of the spectrum until interference would be caused an LMDS licensee, at which time the secondary licensee will have to eliminate the interference or cease operations. Since, as with the incumbent 31 GHz licensees, the new licensees may not expand or increase the authorized operations, they also are limited to modifications of their operations under Section 101.61 that do not require prior authorization and allow for the replacing of equipment or other small changes to ensure flexibility without expansion. The *Second Report and Order* amended the modification procedures in Section 101.57 to exclude incumbent licensees from filing applications for such license modifications, and we will also amend the rule to preclude licensees authorized on the basis of the pending applications filed before March 11, 1997, from filing such modification applications.[300]

iii. New Applications

177. Only entities that had applications on file when the Commission adopted the *Second Report and Order* on March 11, 1997, and were dismissed at that time are eligible to refile such applications as described above. This is an exception to the Commission's determination to terminate future licensing under the 31 GHz rules and is based on unique and distinguishable circumstances discussed above. As discussed earlier in this Order, we do not find any basis on reconsideration to support the continued licensing of 31 GHz services, including traffic control systems, rather than designating the 31 GHz band exclusively for future licensing under the LMDS rules. Therefore, we will not accept any new applications for such 31 GHz operations. Any ongoing 31 GHz operations will be limited either to those of the incumbent licensees or of the licensees who refile their applications dismissed on March 11, 1997, and are authorized under the terms and conditions in this Order.

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[298] *Second Report and Order*, 12 FCC Rcd at 12591 (para. 105), adopting 47 C.F.R. §§ 101.147(a) n. (16), 101.147(u), 101.803(a) n. (7), 101.803(d) n. (9).

[299] 47 C.F.R. § 101.67.

[300] *Second Report and Order*, 12 FCC Rcd at 12590 (para. 103), amending 47 C.F.R. § 101.57.

178. We have pointed out that, in deciding whether to permit future licensing of 31 GHz services, the *Second Report and Order* balanced all of the evidence to determine the public interest and concluded that the benefits of allowing growth of incumbent services is outweighed by the potential harm to LMDS.[301] Although we have decided that there is no adverse impact on LMDS of allowing the pending applicants to operate on 31 GHz on a secondary basis to LMDS, that would not be the case with allowing the filing of new 31 GHz applications for access to spectrum that is designated for LMDS. While we will authorize the new licenses based on the dismissed applications on a secondary basis to LMDS, we do not find that applying similar treatment to future licensing of 31 GHz services would alleviate the concerns of potential harm to LMDS nor benefit such future licensees.

179. We recognize that, in addition to the interest reflected in the pending applications to use 31 GHz for traffic systems, there is support from various governmental entities for the growth of 31 GHz traffic systems to meet Federal goals to reduce vehiclar traffic congestion and air pollution.[302] There are important public interest objectives served by the synchronization of traffic lights through use of wireless technology, including the benefits to the environment of reduced pollution, lessened demand for new highways, and accident reduction. We reiterate, however, that there are alternative means by which governmental entities seeking access to 31 GHz to initiate traffic control systems may still acquire spectrum or can otherwise obtain the traffic services they need.[303] The alternative means, and the other spectrum options in particular, would better serve the important objectives of governmental entities seeking to use the 31 GHz band for traffic control services than new 31 GHz licenses secondary to LMDS and susceptible to preemption and interruption.

180. Among the alternatives we have discussed, LMDS licensees may partition and disaggregate spectrum to governmental entities under the LMDS service rules. In light of the flexibility in the Commission's rules, LMDS licensees also may have the opportunity to develop a traffic control service to provide to municipalities. In addition, governmental entities can bid on the 150 megahertz LMDS license that the Commission established to accommodate niche markets or smaller operators. Moreover, governmental entities may use a different transmission technology and medium than the 31 GHz band to provide traffic control services.

181. Incumbent providers on 31 GHz spectrum were authorized under the fixed microwave service rules in Part 101 that the Commission modified in the *Second Report and*

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[301] *See* para. 152, *supra.*

[302] *See* para. 151, *supra.*

[303] *See* paras. 154-156, *supra.*

Order to exclude future licensing only on the 31 GHz band.[304] There are several spectrum bands identified in those rules that are available for a governmental entity to seek authorization of the private operational fixed point-to-point services that permit operation of traffic control systems.[305] Indeed, Nevada DOT and USDOT described the development of traffic control systems for a variety of bands, and indicated that 31 GHz is one of several bands being used for the Las Vegas system.[306]

182. Among the frequencies available to accommodate traffic light control is the 23 GHz band, between 21.1-23.6 GHz, that the Commission considered in the *Second Report and Order* as a possible band for relocating the incumbent licensees to enable them to continue their existing operations on a primary basis.[307] Although the Commission found the cost of modifying existing 31 GHz radios or replacing them with 23 GHz equipment too burdensome to conclude that 23 GHz was a suitable substitute for incumbent licensees, that is not the case for new applicants that have not purchased 31 GHz equipment and seek a viable alternative to 31 GHz spectrum for traffic light synchronization and control purposes. In the 23 GHz band, as well as other bands listed in the rules for assignment for private fixed services, the operations would have primary, protected status and governments purchasing such systems could expect that the equipment would have useful lives uninterrupted by LMDS or other services.

b. Notice Issues

183. We do not persuasive Sierra's arguments that reconsideration of the dismissal of the pending applications is required because the Commission failed to provide sufficient notice of the proposed rule change to redesignate 31 GHz for LMDS. As Sierra acknowledges, the pending applications were filed after the *Fourth NPRM* and before the *Second Report and Order* and, thus, the Commission concluded that the applicants had notice of the possibility of a change in the rules for the 31 GHz band.[308] The *Fourth NPRM* set out the proposal to redesignate the 300 megahertz in the 31 GHz band for LMDS on a protected

[304] *Second Report and Order*, 12 FCC Rcd at 12590-91 (paras. 104-105).

[305] 47 C.F.R. § 101.101.

[306] *Second Report and Order*, 12 FCC Rcd at 12573-74, 12588-89 (paras. 58-59, 99).

[307] *Id.* at 121579 (paras. 72-73).

[308] *Id.* at 12589 (para. 100).

basis and the impact of the proposal on incumbent services which the Commission pointed out are unprotected under their service rules.[309]

184. The Commission determined that, in light of this impact on incumbent services, it was appropriate to seek comment on whether to accept new applications, modifications, or renewal applications in the 31 GHz band. Indeed, several of the comments, including those of Sierra and Nevada DOT, specifically addressed our request for comments and the dismissal of pending applications, which we fully considered in the *Second Report and Order*.[310] These comments demonstrate that Sierra and Nevada DOT knew that future licensing under the 31 GHz rules was in jeopardy and had notice that, if the Commission adopted its proposals, applications for new licenses might not be considered.

4. Frequency Tolerance Level

185. Sierra requests that, with respect to the outer 150 megahertz segment of the 31 GHz band, the Commission rescind or postpone for two years the 0.001 percent frequency tolerance requirement the Commission adopted in the *Second Report and Order* in the LMDS technical rules.[311] Sierra requests that we reinstate the former tolerance level in the 31 GHz service rules of 0.030 percent. Sierra argues that the new tolerance standard for LMDS will prevent governmental entities from expanding operations and prevent use of its existing 31 GHz equipment. Sierra cites engineering data that it had presented to show the cost of modifying its equipment to meet the new tolerance level under the LMDS rules. Sierra further argues that LMDS has no need for the 0.001 percent level because it is unlikely that LMDS will even use the spectrum. Finally, Sierra argues that the Commission failed to give appropriate notice of the new frequency tolerance when it proposed to designate the band for LMDS.

186. We deny Sierra's request. As discussed above, we deny Sierra's request for reconsideration of our determination to designate the outer 150 megahertz segment of the 31 GHz band for LMDS. The Commission adopted the 0.001 percent frequency tolerance level as appropriate for all LMDS transmitting equipment, based on comments that the Commission sought in the *Third NPRM* on technical rules for LMDS.[312] Sierra does not demonstrate on reconsideration that the level is not appropriate for LMDS or that the 0.030 level for

[309] *Fourth NPRM*, 11 FCC Rcd at 19046-47 (para. 103).

[310] *Second Report and Order*, 12 FCC Rcd at 12587-88 (paras. 94-96).

[311] Sierra Petition at 18-22.

[312] *Second Report and Order*, 12 FCC Rcd at 12668-69 (para. 291).

incumbent services is better suited for LMDS, which is the service to be licensed on the 31 GHz band. As thoroughly discussed, the Commission declined to allow new or expanded 31 GHz services under the incumbent rules and, thus, there is no basis to continue reliance on the prior frequency tolerance level of 0.030 under those rules.[313]

187. In permitting all incumbent 31 GHz licensees to continue operating to the full extent permitted under the existing terms of their licenses without expanding or increasing services, the Commission specifically allowed incumbent licensees authorized before March 11, 1997, to continue their authorized operations at the prior level of 0.030.[314] Thus, to the extent incumbent services continue their authorized operations, they are governed by their existing tolerance level. Sierra does not demonstrate that this provision is inadequate or otherwise fails to permit the licensees authorized under the prior 31 GHz service rules to operate the equipment designed for those services.

188. We will modify our rules to include the additional licenses that we may authorize after March 11, 1997, pursuant to our decision in this Order to permit the refiling of the dismissed 31 GHz applications. As with incumbent licensees, these new licensees would be authorized to provide the requested 31 GHz services that would be governed by the prior service rules, including the prior frequency tolerance level. As for Sierra's concerns about the impact of the new LMDS frequency tolerance level on governmental entity licensees operating under the prior level, those entities that are incumbent licensees as of March 11, 1997, are protected in the outer 150 megahertz segment of the 31 GHz band and are entitled to coordinate with LMDS operators for an accommodation.[315] As discussed above, any governmental entity that may become a new licensee as a result of refiling a dismissed application that was on file before March 11, 1997, will obtain secondary status the same as all 31 GHz incumbent licensees in the middle 150 megahertz segment and all LTTS 31 GHz incumbent licensees.[316]

189. Finally, we reject Sierra's contention that notice was not provided of the LMDS frequency tolerance level. Comments were sought in the *Third NPRM* on all aspects of proposed technical rules for LMDS.[317] In addition, we thoroughly discuss above the adequacy of the notice of the proposed redesignation of the 31 GHz band in the *Fourth NPRM*.

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[313] *Id.* at 12588-91 (paras. 98-105).

[314] *Id.* at 12668-69 (para. 291), adopting footnote 8 to 47 C.F.R. § 101.107.

[315] 47 C.F.R. § 101.103(b)(1)(i), 101.103(b)(1)(ii).

[316] 47 C.F.R. §§ 101.103(b)(1), 101.103(b)(2).

[317] *Third NPRM*, 11 FCC Rcd at 96-98 (paras. 118, 123).

Commenters had ample opportunity to respond to both aspects of our proposals before our deliberations in the *Second Report and Order.*

D. Reconsideration of Dismissal of Waiver Petitions

1. Background

190. In January, 1991, the Commission granted a license to Hye Crest Management, Inc., predecessor-in-interest to CellularVision, to provide LMDS service in the 28 GHz band in the New York Primary Metropolitan Statistical Area (PMSA) pursuant to a waiver of the Part 21 rules which only allowed point-to-point operation in this band.[318] Subsequent to this grant, a total of 971 applications were filed for similar waivers of the rules in order to operate LMDS facilities. The Commission implemented a freeze on the acceptance of applications for common carrier point-to-point microwave service in the 28 GHz band in an order released October 29, 1992, to stop the filing of additional waiver applications.[319] In an Order issued in conjunction with the *First NPRM*, the Commission denied the pending waiver applications because the Commission found it more appropriate to establish service rules for the licensing and operation of LMDS, rather than granting waivers of the existing rules.[320] Several of the LMDS waiver applicants filed petitions for reconsideration of this dismissal.

191. In the Order on Reconsideration released in conjunction with the *Second Report and Order,* the petitions for reconsideration were denied.[321] The Commission stated that it has wide latitude in choosing whether to proceed by adjudication, such as a waiver proceeding, or by rulemaking. Because the waiver applications were found to have raised issues of general applicability, the Commission pointed out that their disposition was better suited to a rulemaking as determined in the *First NPRM.* The Commission alternatively considered whether, on reconsideration, petitioners showed that the waiver applications met the applicable

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[318] Application of Hye Crest Management, Inc., for License Authorization in the Point-to-Point Microwave Service in the 27.5-29.5 GHz Band and Request for Waiver of the Rules, File No. 10380-CF-P-88, Memorandum Opinion and Order, 6 FCC Rcd 332 (1991) (*Hye Crest Order*).

[319] Petitions for Redesignation of the Common Carrier Point-to-Point Microwave Radio Service Frequency Band 27.5-29.5 GHz, RM-7722, RM 7872, Order, 7 FCC Rcd 7201 (1992).

[320] *First NPRM*, 8 FCC Rcd at 564-65 (para. 51).

[321] *Second Report and Order*, 12 FCC Rcd at 12705-11 (paras. 388-406).

standards that govern waiver of frequency allocation in *Big Bend Telephone*.[322] The Commission concluded that, under the standards, the applications also would not be granted because the proposed use of frequencies was detrimental to the assigned users at the time they were filed, they did not meet the public interest standards for waiver of frequency designation, and any unique aspects of a service or an applicant do not outweigh the countervailing public interest in the resolution of the fundamental service issues by rulemaking rather than adjudication.

192. LDH and M3ITC submit petitions for further reconsideration of the Order on Reconsideration that request that the Commission reinstate their applications for processing.[323] They argue that they raise numerous issues that the Commission did not consider previously on reconsideration, such as the rights of previously cut-off applicants, and that the Commission has a statutory obligation to consider these issues. They seek to ensure that all relevant issues are addressed before final action is taken to dismiss their applications for waiver under the previously existing 28 GHz service rules. We consider the issues more fully below, and deny the requests.

2. Retroactive Application of Service Rules

193. LDH and M3ITC argue that the Commission may not retroactively apply new service rules in the 28 GHz band to pending applications. M3ITC argues that the Commission does not have the statutory authority to apply new rules retroactively to parties that engaged in transactions with the agency in good faith reliance upon existing rules.[324] LDH argues that the Commission may adopt new rules, but that giving new rules retroactive effect is an extraordinary measure that the courts in numerous cases have frowned upon.[325] LDH argues that the Order on Reconsideration ignored certain validly adopted rules and statutory requirements that governed the processing of their applications under the existing rules and that the applications may not be dismissed under retroactively applied rules without appropriate consideration.

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[322] Big Bend Telephone Company, Inc. and Dell Telephone Cooperative, Inc., File Nos. 14850-CF-P-84 through 14949-CFP-84, File Nos. 14811-CF-P-84 through 14848-CF-P-84, Memorandum Opinion and Order, 2 FCC Rcd 2413 (1986) (*Big Bend Telephone*).

[323] LDH Petition at 3 n.2; M3ITC Petition at 2.

[324] M3ITC Petition at 2, citing Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988) (*Bowen*).

[325] LDH Petition at 4, citing, among other decisions, Yakima Valley Cablevision v. F.C.C., 794 F.2d 737, 745 (D.C. Cir 1986) (*Yakima Valley*); McElroy Electronics Corporation v. F.C.C., 990 F.2d 1351, 1365 (D.C. Cir. 1993); 86 F.3d 248, 257 (D.C. Cir. 1996).

194. LDH argues that, before the Commission proposed to change the rules in the *First NPRM*, its waiver applications had passed the "cut-off" date when mutually exclusive applications must be filed in response to the public notice of their applications.[326] Many of the applications were the subject of petitions to deny and competing applications, and a settlement proposal was filed. LDH contends that the Commission may not retroactively apply new processing rules to divest applicants of the rights obtained from cut-off status until we balance the harm of retroactive application of new rules with the harm of undermining implementation of the new rules. Specifically, LDH argues that we are required by the statute and our rules to consider the petitions to deny and the settlement agreement submitted for our approval with respect to certain of the applications.[327] LDH also argues that the Commission is required under the auction authority in Section 309(j) of the Act to take measures to expedite service to the public and avoid mutual exclusivity, and that the Commission did the opposite when it dismissed the cut-off applications.[328] LDH contends that granting those cut-off applications not subject to competing applications and ready for a grant would achieve these goals and avoid reopening the window to increase the number of competing parties.

195. We disagree with petitioners' claims of retroactivity. There are fundamental differences between the applications that were the subject of retroactive rules in the cases relied on by petitioners and the waiver applications that they filed which are under review here. It is well established by the courts that an applicant has no vested right to a continuation of the substantive standards in effect at the time its application was filed, whether or not the application has been accepted and achieved cut-off status.[329] Under these principles, LDH and M3ITC have no vested rights in the waiver applications that were pending at the Commission and that were dismissed in order to implement new LMDS service rules. Therefore, the Commission is not applying a rule "retroactively," as petitioners claim, when it applies new application standards to applicants with pending applications. The

[326] LDH Petition at 4-6; 47 C.F.R. § 21.31.

[327] LDH Petition at 7-8.

[328] *Id.* at 5-6.

[329] *See, e.g.*, Chadmore Communications, Inc. v. F.C.C., 113 F.3d 235, 240-41 (D.C. Cir. 1997) (Commission's application of new policy on "extended implementation authority" to pending applicants did not have a "retroactive effect" because pending applicants did not have any vested right to continued application of the rules in effect when they filed their applications); Hispanic Information & Telecom. Network v. F.C.C., 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) ("The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.").

petitioners' situation is distinguishable from the cases relied on by petitioners in which rule changes were applied so as to affect vested rights or liabilities.[330]

196. These principles apply with greater force with respect to petitioners' waiver applications because petitioners did not even qualify for licenses under the service rules that were in effect when they filed their applications. Petitioners were seeking waivers of the existing point-to-point rules they now ask us to enforce so as to permit them to provide a substantially different service, LMDS. As the Commission found in dismissing the 971 waiver applications in the *First NPRM*, the applications were based on existing point-to-point rules that were not structured for the large amount of spectrum requested for individual licensees and did not reflect the geographic service areas or the technical parameters proposed for the new LMDS service.[331] Granting the waiver requests would amount to a *de facto* redesignation of the 28 GHz band and, as the Commission emphasized on reconsideration in the *Second Report and Order*, such issues of general applicability should be considered under our rulemaking authority rather than by adjudication through separate waiver proceedings.[332]

197. The Commission, thus, properly dismissed applications in which applicants clearly had no vested rights in the continuation of standards they sought to waive, and which raised issues of general applicability better resolved by rulemaking. Furthermore, the extent to which any of the waiver applications had been processed under the existing rules and achieved cut-off status is not relevant, because the Commission has found that the applications did not meet the applicable standards for waiver. As the Commission stated, even if only a few waiver applications had been filed, any showing of further interest in point-to-multipoint service in the 28 GHz band would have warranted the decision to institute a rulemaking proceeding to accommodate the new service.[333] Limiting the number of waiver applications by examining only cut-off applications would not have resolved the underlying spectrum policy issues raised by these applications.

198. Finally, we disagree with LDH that the Commission acted inconsistent with its auction authority under Section 309(j) by refusing to grant certain of the cut-off applications. The Commission dismissed the applications for sufficient reasons long before it adopted rules

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[330] In *Yakima Valley* the Commission retroactively changed its enforcement policy with respect to cable franchise fees that were imposed prior to the policy change. Similarly, in *Bowen* the Department of Health and Human Services applied new limits on medicare reimbursements to services rendered prior to the adoption of the new limits, for which the health care providers had vested rights to reimbursement.

[331] *First NPRM*, 8 FCC Rcd at 564-65 (para. 51).

[332] *Second Report and Order*, 12 FCC Rcd at 12705 (paras. 388-389).

[333] *Id.* at 12711 (para. 405).

to designate the 28 GHz band for LMDS and to use auction procedures to choose from among mutually exclusive applications filed pursuant to those new rules. Although LDH is correct that Section 309(j)(6)(e) instructs the Commission to avoid mutual exclusivity and proceed with auctions, that provision was not in existence and did not apply to the circumstances under which the Commission summarily dismissed the waiver applications.[334]

3. Standards for Waiver and Summary Dismissal

199. LDH argues that summary dismissal of the waiver applications does not meet the level of review that we are required to give requests for waiver. LDH contends that, as waiver requests, the applications contained detailed specifications of the proposed service and its benefits that the court in *WAIT Radio* stated should not be subject to perfunctory treatment, but must be given a hard look.[335] LDH and M3ITC further argue that the dismissal of the applications is inconsistent with the Commission's treatment of the first waiver application filed by Hye Crest, which was granted, and of the pending MMDS applications, which were permitted to be processed under the prior rules despite the adoption of new wide-area licensing and auction rules in the *MDS Report and Order*.[336] LDH and M3ITC contend that the Commission's summary dismissal of their waiver applications failed to justify their disparate treatment from these other applications.

200. We disagree that summary dismissal of the 971 waiver applications was procedural error. As we discuss above, petitioners have no vested rights that require a grant of their applications for waiver or further processing, either under the Communications Act or the Commission's rules. The applications failed to conform with the point-to-point service rules governing the 28 GHz band under which they were filed. Unless a waiver of the rules is granted, the applications were unacceptable and subject to summary dismissal.[337] The listing of some applications on public notice, the filing of petitions to deny or settlement

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[334] 47 U.S.C. § 309(j)(6)(e); *DIRECTV*, 110 F.3d at 828 ("[T]hat provision instructs the agency, in order to avoid mutual exclusivity, to take certain steps, such as the use of an engineering solution, within the framework of existing policies.").

[335] LDH Petition at 8-9, citing WAIT Radio v. F.C.C., 418 F.2d, 1153, 1157 (D.C. Cir. 1969).

[336] *Id.* at 9-10, citing *Hye Crest Order*, 6 FCC Rcd at 334 (paras. 21-24) and Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and the Instructional Television Fixed Service, MM Docket No. 94-131 and PP Docket No. 93-253, FCC 95-230, Report and Order, 10 FCC Rcd 9589, 9601 (para. 89) (1995) (*MDS Report and Order*); M3ITC Petition at 2.

[337] *See, e.g.*, United States v. Storer Broadcasting, 351 U.S. 192 (1956) (Commission does not have to hold a full hearing on each application but may establish general rules outlining certain of its policies); 47 C.F.R. § 21.20.

proposals, and the passing of the cut-off date for the filing of mutually exclusive applications do not bar the subsequent summary dismissal of such applications that fail to comply with the governing application rules.

201. Moreover, the Commission fully considered, in both the *First NPRM* and the *Second Report and Order*, the specific standards set out in *Big Bend Telephone* and *WAIT Radio* by which we determine whether to waive our service rules.[338] The Commission found that granting these requests would have adversely affected the interests of point-to-point microwave users to which the spectrum was then assigned by depriving them of the spectrum awarded to them. It also concluded that the public interest would not be served because granting a large number of waiver requests would result in the widespread offering of services incompatible with the existing licensing framework for the 28 GHz band. In these circumstances, the public interest was found to be better served by initiating a rulemaking to develop consistent rules of general applicability to provide for LMDS and avoiding individual waivers to allow services that would make future implementation of LMDS more difficult. These determinations satisfied the "hard look" requirement of *WAIT Radio* for considering waivers.

202. Furthermore, petitioners' claims of disparate treatment are without merit, inasmuch as the waiver applications that were summarily dismissed were not similarly situated with either Hye Crest's application or the MMDS applications. In dismissing the waiver applications in the *First NPRM*, the Commission fully considered the different circumstances that prevailed in its considerations of the first waiver application filed by Hye Crest.[339] In *Hye Crest*, the Commission had found that a formal rulemaking proceeding to permanently redesignate the band for LMDS was premature inasmuch as the waiver was not a *de facto* redesignation of the band and an onslaught of waiver requests was not anticipated. An initial waiver would allow some experimental use of the band for LMDS. In considering the waiver applications subsequently filed, the Commission found that granting them would constitute a *de facto* redesignation of the band that should be handled by a rulemaking proceeding. This is the course the Commission said it would take if interest in using the band for point-to-multipoint services did develop. As for the MMDS applications cited by petitioners, those applications were filed in compliance with the applicable MMDS service rules and the issues were confined to determining the method for selecting among mutually exclusive applications.[340] This is entirely different from the waiver applications at issue here, which

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[338] *First NPRM*, 8 FCC Rcd at 565 (paras. 52-53); *Second Report and Order*, 12 FCC Rcd at 12706-11 (paras. 390-406).

[339] *First NPRM*, 8 FCC Rcd at 565 (paras. 52-53).

[340] *MDS Report and Order*, 10 FCC Rcd at 9569 (para. 89).

sought to implement a new service not provided in the rules and which raised issues of general applicability.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

203. A Supplemental Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act,[341] is set forth in Appendix C.

B. Further Information

204. For further information concerning this rulemaking proceeding contact Barbara Reideler or Jay Whaley, Policy Division at (202) 418-1310, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C. 20554.

VI. ORDERING CLAUSES

205. ACCORDINGLY, IT IS ORDERED that the actions of the Commission herein ARE TAKEN pursuant to Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 257, 303(r), 309(j).

206. IT IS FURTHER ORDERED that the late-filed letters of CommPare, Inc., CSG Wireless, Inc., State of Nevada Department of Transportation, Parsons Transportation Group, Inc., and Westec Communications, Inc., ARE ACCEPTED.

207. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by the Independent Alliance, LBC Communications, LDH International, Inc., M3 Illinois Telecommunications Corporation, the Rural Telecommunications Group, Sierra Communications, Inc., and Webcel Communications, Inc., ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

208. IT IS FURTHER ORDERED that the Motion for Stay Pending Review of Petition for Reconsideration filed by LDH International, Inc., IS DENIED.

209. IT IS FURTHER ORDERED that the Commission's Rules ARE AMENDED as set forth in Appendix B.

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[341] 5 U.S.C. § 604.

210. IT IS FURTHER ORDERED that the applications that were dismissed in the *Second Report and Order* are permitted to be refiled under the terms and conditions in this Third Order on Reconsideration and SHALL BE FILED no later than 60 days following the effective date of this Order.

211. IT IS FURTHER ORDERED that the provisions of this Order and the Commission's Rules, as amended in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication of this Order in the Federal Register.

212. IT IS FURTHER ORDERED that the Director, Office of Public Affairs, SHALL SEND a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

List of Pleadings

Petitions for Reconsideration

The Independent Alliance (Alliance)
LBC Communications, Inc. (LBC)
LDH International, Inc. (LDH), filed together with a Motion for Stay Pending Review of Petition for Reconsideration.
M3 Illinois Telecommunications Corporation (M3ITC)
The Rural Telecommunications Group (RTG)
Sierra Digital Communications, Inc. (Sierra)
Webcel Communications, Inc. (Webcel)

Oppositions to Petitions for Reconsideration

Bell Atlantic Corporation Opposition to Webcel Petition (Bell Atlantic)
CellularVision USA, Inc. Opposition to Sierra Petition (Cellularvision)
Cellularvision Consolidated Opposition to Nevada DOT and RTG Petitions
RTG Opposition to Webcel Petition
Texas Instruments, Inc., Opposition to Sierra Petition (TI)

Letters in Support of Petitions for Reconsideration

Letters of Commpare, Inc. (Commpare), CSG Wireless, Inc. (CSG), Sunnyvale General Devices and Instruments (Sunnyvale), Videolinx, Inc. (Videolinx), and Westec Communications, Inc. (Westec) in support of Sierra Petition.
Letter of Parsons Transportation Group, Inc (Parsons) in support of Nevada DOT Petition.

Letters Requesting Clarification

Alcatel Network Systems (Alcatel)
TI

Ex Parte Letters

Nevada Department of Transportation (Nevada DOT)

Replies to Oppositions

RTG
Webcel

APPENDIX B

Final Rules

Part 101 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 101 - FIXED MICROWAVE SERVICE

1. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. §§ 154, 303, 309(j), unless otherwise noted.

2. Section 101.57 is amended by revising paragraph (a)(1) to read as follows:

§ 101.57 Modification of station license.

(a)(1)(i) Except as provided in paragraph (a)(1)(ii) of this section and in § 101.59, no modification of a license issued pursuant to this part (or the facilities described thereunder) may be made except upon application to the Commission.

(ii) The provisions of paragraph (a)(1)(i) of this section shall not apply in the case of (A) licenses authorized for operation in the 31,000-31,300 MHz band prior to March 11, 1997; (B) non-Local Multipoint Distribution Service licenses authorized for such operation in the band pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**; and (C) the Local Multipoint Distribution Service as provided in § 101.61(c)(10).

* * * * *

3. Section 101.103 is amended by adding paragraph (b)(3) as follows:

§ 101. 103 Frequency coordination procedures.

* * * * *

(b) * * *

(3) Non-LMDS operations in the entire 31,000-31,300 MHz band licensed after March 11, 1997, based on applications refiled no later than **[insert date 60 days after publication in the Federal Register]** are unprotected with respect to each other and subject to harmful interference from each other.

(i) Such operations and any operations licensed prior to March 11, 1997, in the band are unprotected with respect to each other and subject to harmful interference from each other.

(ii) Such operations are licensed on a secondary basis to LMDS operations licensed in the band, may not cause interference to LMDS operations, and are not protected from interference from LMDS operations.

(iii) Such operations licensed on a point-to-point basis may not be extended or otherwise modified through the addition of point-to-point links. Such operations licensed on a point-to-radius basis may add additional stations within the licensed area.

* * * * *

4. Section 101.107 is amended by revising footnote /8/ in paragraph (a) to read as follows:

§ 101.107 Frequency tolerance.

(a) * * *

/8/ For stations authorized prior to March 11, 1997, and for non-Local Multipoint Distribution Service stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**, the transmitter frequency tolerance shall not exceed 0.030 percent.

* * * * *

5. Section 101.113 is amended by revising footnote /8/ in paragraph (a) to read as follows:

§ 101.113 Transmitter power limitations.

(a) * * *

/8/ For stations authorized prior to March 11, 1997, and for non-Local Multipoint Distribution Service stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**, the transmitter output power shall not exceed 0.050 watt.

* * * * *

6. Section 101.147 is amended by revising footnote /16/ in paragraph (a) and by revising the introductory text of paragraph (u) to read as follows:

§ 101.147 Frequency assignments

(a) * * *

/16/ As of June 30, 1997, frequencies in these bands are available for assignment only to LMDS radio stations, except for non-LMDS radio stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**.

* * * * *

(u) *31,000-31,300 MHz.* Stations licensed in this band prior to March 11, 1997, may continue their authorized operations, subject to license renewal, on the condition that harmful interference will not be caused to LMDS operations licensed in this band after June 30, 1997. Non-LMDS stations licensed after March 11, 1997, based on applications refiled no later than **[insert date 60 days after publication in the Federal Register]** are unprotected and subject to harmful interference from each other and from stations licensed prior to March 11, 1997, and are licensed on a secondary basis to LMDS. In the sub-bands 31,000-31,075 MHz and 31,225-31,300 MHz, stations initially licensed prior to March 11, 1997, except in LTTS, and LMDS operations authorized after June 30, 1997, are equally protected against harmful interference from each other in accordance with the provisions of § 101.103(b). For stations, except in LTTS, permitted to relocate to these sub-bands, the following paired frequencies are available:

* * * * *

7. Section 101.803 is amended by revising note /7/ of paragraph (a) and revising note /9/ of paragraph (d) to read as follows:

§ 101.803 Frequencies.

(a) * * *

/7/ As of June 30, 1997, frequencies in this band only are available for assignment to LMDS radio stations, except for non-LMDS radio stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**. Stations authorized prior to June 30, 1997, may continue to operate within the existing terms of the outstanding licenses, subject to renewal. Non-LMDS stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]** shall operate on an unprotected basis and subject to harmful interference from

similarly licensed stations or stations licensed prior to June 30, 1997, and on a secondary basis to LMDS radio stations.

* * * * *

(d) * * *

/9/ As of June 30, 1997, frequencies in this band only are available for assignment to LMDS radio stations, except for non-LMDS stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]**. Stations authorized prior to June 30, 1997, may continue to operate within the existing terms of the outstanding licenses, subject to renewal. Non-LMDS stations authorized pursuant to applications refiled no later than **[insert date 60 days after publication in the Federal Register]** shall operate on an unprotected basis and subject to harmful interference from each other or stations licensed prior to June 30, 1997, and on a secondary basis to LMDS radio stations.

* * * * *

APPENDIX C

Supplemental Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, *See* 5 U.S.C. § 603 (RFA), a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix D of the Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking (*Second Report and Order)* in this proceeding.[1] The Commission's Supplemental Final Regulatory Flexibility Analysis (SFRFA) in this Third Order on Reconsideration reflects revised or additional information to that contained in the FRFA. The SFRFA thus is limited to matters raised in response to the *Second Report and Order* that are granted on reconsideration in the Third Order on Reconsideration. This SFRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 846 (1996), codified at 5 U.S.C. §§ 601 *et seq.*[2]

I. Need For and Objectives of the Action

The actions taken in this Third Order on Reconsideration are in response to petitions for reconsideration or clarification of the service rules adopted in the *Second Report and Order* to implement the new Local Multipoint Distribution Service (LMDS) on the 28 GHz and 31 GHz frequency bands. The petitions are denied, except the petitions seeking reconsideration of the decision to dismiss the pending applications requesting authorization of 31 GHz services under the previous service rules. The rule changes adopted in the Third Order on Reconsideration allow the dismissed applicants to refile their applications for the same 31 GHz authorization, but on a secondary basis to LMDS. The rule changes are intended to permit the limited 31 GHz services requested in the dismissed applications that include traffic control systems, among other services in the public interest, while reaffirming the Commission's decision to terminate future licensing of new applications under the previous 31 GHz service rules and designate the 31 GHz band for LMDS, which offers a wide array of telecommunications and video programming distribution services.

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[1] Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, CC Docket No. 92-297, Suite 12 Group Petition for Pioneer Preference, PP-22; Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12768-89 (1997) (*Second Report and Order*). Certain abbreviated references used in the Third Order on Reconsideration are also used in this Appendix.

[2] Title II of the Contract with America Act is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA).

II. Summary of Significant Issues Raised by the Public in Response to the Final Regulatory Flexibility Statement

No comments were received in direct response to the FRFA. In response generally to the *Second Report and Order*, the Commission received petitions, as well as *ex parte* letters and letters in support, that seek reconsideration, and also received oppositions to those petitions. Sierra requests that the dismissed 31 GHz applications be reinstated and the licensees given the same interference protections and relocation procedure that the Commission accorded incumbent 31 GHz licensees when it redesignated the 31 GHz band for LMDS. Sierra argues that the potential public interest benefits in authorizing the requested services in the dismissed applications, which include public safety services and public expenditures, outweigh any benefits that may come from licensing 31 GHz for LMDS free of the requested services. Nevada DOT requests that its applications and the applications of the Cities for a traffic control system be granted on a temporary basis and secondary to LMDS in order to allow the implementation of equipment that was purchased and installed and to provide public safety services while the licensees seek an alternative technology or frequency band.

CellularVision and TI oppose the requests. They contend that authorization of the 31 GHz operations in the dismissed applications is inconsistent with the decision to designate the 31 GHz for LMDS and that the operations would interfere with LMDS, result in enforcement problems for LMDS, and precipitate other applications for similar relief.

III. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The rule changes adopted in the Third Order on Reconsideration would apply to a specific number of entities that had pending applications for authorization of 31 GHz services on file that were dismissed when the Commission adopted the *Second Report and Order* on March 11, 1997. We estimate that there are approximately 10 dismissed applicants with several dismissed applications, based on Commission records. The dismissed applicants are permitted to refile the dismissed applications and obtain a license to provide the 31 GHz services designated in the band before the Commission designated the band for LMDS. No new applicants may request such 31 GHz authorization. Also, no new applications may be filed by the dismissed applicants, which may only refile the dismissed applications.

The FRFA found that the rules adopted at that time would apply to all incumbent 31 GHz licensees providing 31 GHz services under the previous 31 GHz service rules. The Commission determined the description and estimate of the number of small entities among the total number of 31 GHz licensees based on the licensed services and their qualifications as small entities. Of the total number of 86 licensees, 59 were LTTS licensees, 8 were private

business licensees, and 19 were governmental entities. To determine which of the licensees qualified as small entities, the Commission estimated the number of governmental entities with populations less than 50,000, but was unable to determine which of LTTS licensees or private business licensees were small. To ensure that no small interests were overlooked, the Commission assumed that most of the licensees were small entities and estimated that at least 50 of the 86 licensees to be small entities.[3]

Since the revisions adopted in the Third Order on Reconsideration do not apply to incumbent 31 GHz licensees, the estimates of small entities in the FRFA is not affected and does not need to be adjusted. The revisions instead apply to the small and specific number of dismissed applicants that requested 31 GHz licenses and are permitted to refile for the same services requested in the dismissed applications. There are a variety of dismissed applicants, including governmental entities and private businesses. Inasmuch as the total number of dismissed applicants is very small and only ten are estimated, we will assume that all of these are small entities in order to ensure that no small interests are overlooked.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The dismissed applicants have the option to refile applications for the same services requested in the dismissed applications within 60 days following the effective date of the Third Order on Reconsideration. Not all of the dismissed applicants may decide to refile their dismissed applications. The filing fees were refunded to the dismissed applicants that paid fees. The applicants may only apply for the same stations and services contained in the dismissed applications, and the licenses will be secondary to LMDS licenses. All of the dismissed applications requested service authorizations that are governed by the established licensing, operating, and technical rules and procedures in Part 101 of the Commission's Rules (47 C.F.R. §§ 101.1 *et seq.*). Thus, the data required for refiling the dismissed applications were collected on the dismissed applications and the refiling requirement does not require new information nor impose any undue burdens on the dismissed 31 GHz applicants, including small businesses.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The rule changes adopted in the Third Order on Reconsideration are in response to petitions for reconsideration filed by entities that, for purposes of this analysis, we have

[3] *Second Report and Order*, 12 FCC Rcd at 12780-81.

considered to be small entities. The changes minimize any significant economic impact on small entities consistent with our objectives in adopting the rule changes and consistent with the comments we received.

The requests of Sierra, Nevada DOT, and other commenters are granted to permit the 31 GHz operations requested in the dismissed applications. Although we determine that terminating future licensing under the 31 GHz rules was consistent with the public interest in designating the 31 GHz band for LMDS, we find that permitting the operations reflected in the dismissed applications and modified by the Order is an exception based on unique circumstances that is in the public interest. Nevada DOT demonstrates that dismissal of the considerable number of applications to implement the Las Vegas traffic control system would not spare the unnecessary expenses identified in the *Second Report and Order*, but rather would prevent the use of purchased and installed equipment until a replacement technology is found. To the extent that applicants have already invested in constructing these systems, the system could be implemented during the inception of LMDS without substantial additional investment for retooling or relocation at this time.

Although Sierra requests that we reinstate the dismissed applications, we decide that providing the dismissed applicants with the opportunity to refile the applications is a more reasonable approach to licensing the dismissed applications. The filing fees were returned to the dismissed applicants that paid fees. The Third Order on Reconsideration reaffirms the dismissal of the pending applications, but without prejudice to their being refiled within 60 days of the effective date of this Order to provide applicants time to consider whether to refile. Circumstances have changed since the pending applications were filed and reinstated application may not reflect the applicant interests or intentions. The new licenses will be secondary to LMDS licenses and limited to the scope of the services authorized, without modification for expansion. Dismissed applicants that do not wish to operate in this manner have the option to not reapply.

We decide to permit the dismissed applicants to refile the applications for licensed authorization under the established licensing procedures in Part 101, which governed the dismissed applications. Licenses will be issued for a 10-year period and may be renewed, which provides Nevada DOT more opportunity to implement its services than the temporary license it requested. As for CellularVision's concern that allowing the refiling of the dismissed applications will encourage the filing of similar applications, only the applications that were dismissed in the *Second Report and Order* may be refiled and they are limited to the same stations and services contained in the pending applications. The number of applicants are very few and the scope of their services is already identified in the dismissed applications, so that uncertainties about the impact of the refiling opportunity should be reduced.